IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1198 OF 1995

1. Shri.Vishnu Maruti Ghosale
   Aged about 50 years,
   Occu. Agriculturists.

2. Shri.Shripati Maruti Ghosale
   alias deceased through his
   heirs and legal
   representatives

2A. Smt.Radhabai Shripati Ghosale
   Aged about 56 years,
   Occu - Household

2B. Shri.Santosh Shripati Ghosale
   Aged about 28 years,
   Occu. Agriculturist

2C. Shri.Ajit Shripati Ghosale
   Aged about 25 years,
   Occu. Agriculturist

   Nos.2A to 2C above all
   residing at Varje Malwadi,
   Taluka Haveli, Dist Pune.

3. Shivaji Maruti Ghosale,
   Aged 45 years, Occu Agril.
   Nos.1 to 3 all residing at
   Varje Malwadi, Tal Haveli
   District Pune.

4. M/s.Atul Enterprises,
   through its Prop. Shri
   Hemraj S. Mundada, Age
   Adult, residing at 31,
   Sheela-Vihar Colony,
   Paud Phata, Pune 411 038 .. Petitioners.

V/s.

1. The Appropriate Authority
   (under Income Tax Act)
   having office at 4th floor,
   Nature view Bldg., Near
   H.K. House, Ashram Road,
   Ahmedabad.

2. Chief Commissioner of
Income-tax, having his
office at Ayakar Bhavan,
12, Sadhu Vaswani Marg,
Pune - 1.

3. Union of India,
Notice of respondent No.
1 and 2 above be served on
Union of India having their
office at Aayakar Bhavan,
Marine Lines, Bombay .. Respondents.

Ms.Asifa Khan, Advocate with Mr.V.H. Patil, Advocate i/b. S.S. Hardikar, Advocate for the petitioners.

Mr.R. Asokan, Advocate for the respondents.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATED : 25TH NOVEMBER, 2005.

ORAL JUDGMENT (PER J.P. DEVADHAR, J.)

1. This petition is filed to challenge the order dated February 23, 1995, wherein, the appropriate authority has ordered pre-emptive purchase of the immovable property belonging to the petitioner Nos.1 to 3 under Section 269UD(1) of the Income Tax Act, 1961 (‘Act’ for short). According to the petitioners the findings recorded in the impugned order that the apparent consideration has been undervalued by 15% or more than the fair market value is wholly erroneous because, firstly, the sale instance property (‘SIP’ for short) referred to in the impugned order is not comparable and secondly, even on the basis of the price of the SIP it is not established that the alleged undervaluation exceeds

15% or more than the fair market value and, therefore, the impugned order is liable to be quashed and set aside.

2. The relevant facts are that the petitioner Nos.1 to 3 are owners of a open plot of land bearing Survey No.113 admeasuring 3 hectares and 93 acres situated at Village Varje, Taluka Haveli, District Pune. Out of the said lands, development rights in respect of 7 acres of law were given by the petitioner Nos.1 to 3 to the petitioner No.4 for development under the development agreement dated November 14, 1994. The said 7 acres of land are situated to the north of National Highway No.II on the hilltop and the consideration shown in the said development agreement was Rs.80,00,000/-.

3. The petitioners forwarded the said development agreement along with the requisite form No.37-I to the competent authority seeking approval of the appropriate authority under Chapter XX-C of the Act. On February 9, 1995 a notice was issued under Section 269UD(1A) for purchase of the said property on the ground that the apparent consideration shown in the agreement dated November 14, 1994 was undervalued by more than 15%. The petitioners replied to the said show cause notice inter alia contending that the SIP referred to in the

show cause notice is not comparable and that even if the price of the SIP taken into account, it cannot be said that the alleged undervaluation is 15% or more and hence the proceedings be dropped. Rejecting the contentions of the petitioners, the appropriate authority by its order dated February 23, 1995 held that the apparent consideration in respect of the property under consideration ('PUC' for short) has been understated by more than 15% and, accordingly ordered that it is a fit case for pre-emptive purchase under Section 269UD(1) of the Act. Challenging the aforesaid order, the present petition is filed.

4. Ms.Khan, learned advocate appearing on behalf of the petitioners sought to challenge the impugned order mainly on two grounds. Firstly, the transfer of development rights is not covered under Chapter XX-C and, therefore, the impugned order passed under the provisions of Chapter XX-C cannot be sustained. Secondly, the SIP referred to in the impugned order is not comparable with the PUC and even on the basis of the price of SIP, there is no under-valuation of 15% and more and, therefore, the impugned purchase order is liable to be quashed and set aside. We requested the learned advocate for the petitioners to address us on the second issue first, so that, if the validity of the impugned order can be

decided on the facts of the present case, then it is not necessary to go into the question as to whether the transfer of development rights is covered under Chapter XX-C or not. Accordingly, the advocate for the petitioners has made her submissions on the second issue.

5. Ms.Khan submitted that the SIP is not comparable with the PUC for the following reasons :-

a) The distance between the PUC and SIP is about 7 kms. The PUC is situate at village Varje, whereas, the SIP is situate at village Pashan.

b) The PUC is situated outside the Pune Municipal Corporation limits, whereas the SIP is situated within the Pune Municipal Corporation limits.

c) The PUC is governed by the Development Control Rules, whereas the SIP is governed by the Pune Municipal Corporation Rules for Development.

d) The PUC is not situated within the developed area, whereas the SIP is situated within the developed area and is surrounded

by constructions.

e) The approach road is not provided to the PUC, whereas the approach road is separately provided for SIP.

f) Internal road area @ 15% of balance area is required to be provided for the PUC whereas no internal road area is required for the SIP.

g) As the PUC is outside the Pune Municipal Corporation limits, the Amenity Open Space requirement is 25%, whereas, in respect of SIP, the Amenity Open Space requirement is 10%.

h) The PUC does not have service road and will have to leave 132 M land in length for the purpose of service road from the highway, whereas the same is not required in the case of SIP.

i) In the case PUC, no additional FSI is available for internal road, service road, open space for amenities etc. whereas in the case of SIP additional FSI is available for the same.

j) The PUC is situated at a distance of approximately 10 kms. from Pune station, whereas the SIP is situated at the distance of approximately 5 kms. from the Pune Station in a different direction.

6. In view of the aforesaid glaring dissimilarities between the PUC and the SIP, the learned counsel for the petitioners submitted that the respondents are not justified in comparing the consideration shown in SIP with the consideration shown in the PUC. Ms.Khan, learned advocate for the petitioners, relied upon the decision of the Madras High Court in the case of CIT V/s. Ms.Rita Joseph reported in 238 ITR 391, wherein it was held that the SIP located 5 kms. away from the PUC can not be taken into account for determining the fair market value. It was further held in that case that without taking into consideration the restrictive covenants attached to the PUC, it could not be said that there is undervaluation. Accordingly, it was submitted that the appropriate authority was in error in relying upon the price of SIP situated 7 kms. away from the PUC with several advantages and disadvantages attached to it.

7. The learned advocate for the petitioners

further submitted, that, even if the apparent consideration of the SIP referred to in the impugned order is taken into consideration, it can be demonstrated that there is no under valuation. From the impugned order, it is seen that as per the departmental working, the net FSI available to the PUC is 19,122 square metres whereas the net FSI available in respect of the SIP is 16,575 square metres. On the basis of the net FSI and the apparent consideration shown in respect of PUC and SIP, the appropriate authority has arrived that the rate per square metre in case of PUC is Rs.418/- and in case of SIP Rs.471/-. Thus, according to the calculation made by the appropriate authority, the difference between the two prices comes to 11.25%. Since the price variation between the two is less than 15%, as per the decision of the Apex Court in the case of C.B. Gautam V/s. Union of India reported in 199 ITR 530 it cannot be inferred that there is undervaluation with a view to evade tax. Ms.Khan further submitted that admittedly the SIP was sold in auction on January 10, 1995 i.e. after about two months from the date of agreement in the case of PUC. During the relevant period, the prices of the immovable property were increasing and, therefore, the price of SIP sold in January, 1995 is not comparable with the development agreement entered into in November, 1994 in respect of the PUC.

8. Ms.Khan further submitted that in a bid to establish that the difference in apparent consideration between SIP and PUC is more than 15%, the appropriate authority has purported to delete 1969 square metres of FSI from the total FSI of 16575 available to SIP, on the ground that 10% of the FSI has to be reserved for the purposes of Government nominees. According to the learned advocate for the petitioners, reservation of 10% flats for government nominees was applicable even in respect of PUC and, therefore, the appropriate authority committed an error in taking into account the 10% reservation only in the case of SIP. For all the aforesaid reasons, the learned advocate for the petitioners submitted that the impugned order is wholly arbitrary and since the SIP is not comparable and there is no undervaluation, the impugned order is liable to be quashed and set aside.

9. Mr.Asokan, learned counsel appearing on behalf of the respondents, on the other hand, submitted that in the present case the appropriate authority has taken all material facts placed on record and gave its finding of fact that there is undervaluation exceeding 15% and, accordingly ordered for purchase of the PUC. Mr.Asokan relied upon the decision of this Court in the case of Prime Time

Media Services Private Limited V/s. U.V. Shahdadpuri & Others reported in 217 ITR 417 and submitted that the decision of the appropriate authority being a finding of fact, the same cannot be disturbed in exercise of writ jurisdiction. Mr.Asokan further submitted that the PUC is situated along the Pune-Bangalore highway and after taking into consideration the disadvantages attached to the PUC, the net FSI available has been calculated. Therefore, the grievance of the petitioners that the SIP is not comparable cannot be accepted. He submitted that if the discounted value and the reservation of 10% flats to government employees is taken into account then the undervaluation becomes much more than 15% and, therefore, the appropriate authority was justified in passing the impugned order. Accordingly, Mr.Asokan submitted that no interference is called for in writ jurisdiction and the petition is liable to be dismissed.

10. We have carefully considered the rival submissions and also the documents placed before us.

11. By the decision of the Apex Court in the case of C.B. Gautam V/s. Union of India [199 ITR 530] as well as the subsequent decisions of this court and the Apex Court, it is now well established that the provisions of Chapter XX-C of the Act can be

resorted to only on establishing that the immovable property agreed to be sold is significantly undervalued with a view to evade tax and if the appropriate authority is satisfied that the apparent consideration shown is less than the fair market value by 15% or more, then, it may draw a presumption that the said undervaluation has been done with a view to evade tax and accordingly order purchase of the said property by the Central Government. In order to draw inference of undervaluation, it is necessary to determine first the fair market value of the property in question in the light of all the attending circumstances, such as, the locality, size of the plot, conditions attached to it and the sale instances of comparable properties, if any, situate in the locality.

12. In the present case, it is not in dispute that the distance between the PUC situated at Village Varje and the SIP situated at Village Pashan is of about 7 kms. The PUC is situate near Pune-Bangalore highway and the SIP is situate on the hilltop. Market value of the property situated near the highway cannot be compared with the property situated on the hilltop because, both the properties have merits and demerits which are not comparable. Apart from the above, the PUC is situated outside the Pune Municipal Corporation limits, whereas the SIP is

situated within the Pune Municipal Corporation limits. Moreover, in the present case it is seen that there are distinguishable features between the two properties regarding the approach road, internal road, service road and amenity open space required to be kept open. The very fact that there are various disadvantages attached to the PUC compared to the SIP itself is sufficient to hold that the SIP is not comparable with the PUC. The appropriate authority has resorted to addition and subtraction of various advantages and disadvantages and arrived at the conclusion that the undervaluation is more than 15%, which in our opinion is not proper. If the SIP is not comparable with the PUC then it is not open to the appropriate authority to resort to mathematical calculations and by adding and subtracting the advantages and disadvantages arrive at a conclusion that there is undervaluation. The fact that the PUC is situated at a distance of approximately 10 kms from the Pune station whereas the SIP situated approximately 5 kms away from the Pune station in another direction is also a factor which cannot be ignored.

13. It is contended by the advocate for the petitioners that even if the apparent consideration of SIP is taken into account it cannot be said that there is undervaluation exceeding 15%. In the

present case, as per the appropriate authority, the rate per square metre in the case of PUC is Rs.418/- and in the case of SIP Rs.471/- per square metre. Thus, the difference in the rate between the two properties as per the appropriate authority is about 11.25% which is less than 15%. In a bid to establish that the price variation between the two properties is too high, the appropriate authority has sought to deduct 1969 square metres of FSI out of the total 16575 square metres FSI available to SIP on account of reservation of 10% flats to government nominees. According to the petitioners the same yardstick should be applied in respect of the PUC also. It is not brought to our notice that reservation of 10% flats for government nominees is not applicable to the PUC. Therefore, it appears that deduction of 10% FSI in the case of SIP does not appear to be correct. In any event, in the facts of the present case, we are of the opinion that the SIP referred to in the impugned order is not comparable with the PUC and in view of several disadvantages attached to the PUC, the appropriate authority was not justified in resorting to mathematic calculation of adding and subtracting the advantages and disadvantages between totally dissimilar properties and arriving at the conclusion and that there is undervaluation, thereby inferring that there is evasion of tax. The decision of this Court in the case of Prime Time Media

Services Pvt.Ltd. (Supra) which is relied upon by the revenue is distinguishable on facts. In that case, the purchase order was held to be valid in view of the peculiar conduct of the petitioner therein. In that case the petitioner had permitted the auction to proceed and accordingly on auction, third party interest was created in respect of the property in question. Moreover, in that case, the Court found that the instances relied upon by the appropriate authority were comparable. In the present case, in our opinion, the SIP relied upon by the appropriate authority is not comparable and it is not open to the appropriate authority to take in to account sale instance of non comparable properties and arrive at a conclusion that there is under-valuation of 15% or more by making additions and deletions of the advantages and disadvantages attached to the totally dissimilar properties.

14. In view of our above finding, it is not necessary to go into the question as to whether the transfer of development rights is covered under Chapter XX-C of the Act or not.

15. In the result, the petition succeeds. The impugned order dated February 23, 1995 is quashed and set aside. Rule is made absolute in terms of prayer clause (b). However, there will be no order as to

costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)